United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2129

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JOSEPH POWELL, Petitioner-Appellant, -against- THE HONORABLE J. EDWIN LaVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York, Respondent-Appellee.	Docket No. 74-2129

APPENDIX TO PETITIONER-APPELLANT'S BRIEF

ON APPEAL FROM A DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE BONSAL [redacted]

Jury demand date:

74 CIV. 471

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel., JOSEPH POWELL -V- SUPT. CLINTON CORRECTIONAL FACILITY, J.E. LaVALLEE	For plaintiff: Joseph Powell Box B Dannemora, N.Y., 12929 For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed XXXXXXXXXX	Clerk				
J.S. 6 mailed ✓	Marshal				
Basis of Action: Writ of Habeas Corpus 28 USC 2254	Docket fee				
	Witness fees				
Action arose at:	Depositions				

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JUDGE BONSAL 74 CIV. 471

J. POWELL -V- J.E. LaVALLEE

DATE	PROCEEDINGS	Date Judgme
n.29,74	Filed petition for writ of habeas corpus.	
n.29,74	Filed order granting petitioner to proceed in forma pauperis.Brieant,J.	
b.13-74	Filed order extending time of respondent to file his answering affidavit to 2/19/74-Lasker, J.	
r.13-74	Filed order extending time of respondent to file his answering affidavit to 3/19/74-Pollack, J.	
r.20-74	Filed affidavit of Arlene R. Silverman in opposition to petitioner's application for a writ of habeas corpus.	
pr.10,74	Filed notice of assignment to Bonsal,J..	
pr.18-74	Filed affidavit of petitioner Re: Review of the hearing minutes.	
un.6-74	Filed MEMORANDUM DECISION #40777: Petitioner, Pro se seeks a writ of, habeas corpus.Petition for writ of habeas corpus is denied., However, in view of the important constitutional questions presented, leave to appeal in forma pauperis & for a certificate of probable cause is granted. So ordered, Bonsal,J.	
Aug 29-74	Filed notice of appeal by petitioner. from Memorandum decision #40777 dated June 6-74 dismissing petitioner's complaint.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel.
JOSEPH POWELL,

Petitioner,

-v-

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent.

- -x

40777

PRO SE 74 Civ. 471

MEMORANDUM

BONSAL, D. J.

Petitioner, pro se, seeks a writ of habeas corpus.

Petitioner was arrested on January 23, 1970 in a police raid on apartment 3H at 1874 Loring Place, Bronx, New York. Seized by the police at that time were some 10 pounds of heroin and paraphernalia for "bagging up" heroin. Prior to his trial, petitioner moved to suppress this evidence on the grounds that it was illegally seized. After a hearing before Justice Brust of the New York Supreme Court, Bronx County, petitioner's motion was granted on June 18, 1970. The State took an interlocutory appeal, and on March 25, 1971, the order of the trial court suppressing the

evidence was reversed by the Appellate Division, First Department. 36 A.D.2d 177, 319 N.Y.S.2d 484 (1971) (Nunez & Capozzoli, JJ., dissenting). The New York Court of Appeals affirmed on March 16, 1972. 30 N.Y.2d 604, 331 N.Y.S.2d 445 (1972) (Fuld, C.J., dissenting).

On October 19, 1972, petitioner pled guilty to the charge of criminal possession of a dangerous drug in the first degree and was sentenced to imprisonment for a term of 8 1/3 to 25 years. Petitioner is presently serving his sentence in the Clinton Correctional Facility, Dannemora, New York. By way of habeas corpus, petitioner now asks this Court to pass on the constitutionality of the seizure of evidence which occurred incident to his arrest on January 23, 1970. In view of the ample record in the State court proceedings in which petitioner was represented by counsel, no hearing is necessary.

Facts

Petitioner's arrest on January 23, 1970 was the culmination of an investigation which began some three months earlier. On October 24, 1969 an unknown informant telephoned the Narcotics Bureau office and provided the names and addresses of four women, two of whom were said to be running narcotics mills. These women were Beverly Massey, nicknamed Chalky, Jr., and Naomi Bostick,

nicknamed Chalky, living at 866 Elsmere Place, apartment 2E, and Robbie Taylor and Marcelle Thomas, living at 90 West 164th Street, apartment 6A. As a result of the anonymous phone call, surveillance of these two locations was begun. Inspection of the Bureau of Identification records revealed that both Massey and Bostick had previously been arrested and convicted of violations of the narcotics laws.

On October 29, 1969, Bostick was followed from 866 Elsmere Place to the vicinity of 173rd Street and Walton Avenue, where she met a man named Charles Harris. Together, Bostick and Harris proceeded to 1764 Walton Avenue, apartment 3G. Apartment 3G was kept under surveillance, during which time one of the police officers overheard conversation in which the name "Chalky", Bostick's nickname, was used. At about 10 p.m. the door to apartment 3G opened. Bostick emerged carrying a large number of glassine envelopes and was arrested. Inside apartment 3G, one of the officers saw white powder, glassine envelopes, rubber bands, and scotch tape. In addition to Bostick, three other persons - Charles Harris, Claudette Gary and Pat Jackson - were arrested. While at the station house, Jackson asked one of the officers if he would give Naomi and Beverly a break because, "'These girls just work mills. They are just working girls.'"

On January 5, 1970 surveillance on Massey, Bostick and 866 Elsmere Place was resumed. That same day officer Strano, one of the officers involved in the investigation, requested information about Massey and Bostick from a confidential informant. On a past occasion this informant had given information which led to the arrest of three persons for violation of the narcotics laws. The informant stated that he believed Massey and Bostick to be two girls who stayed at a bar on 116th Street and Fifth Avenue, that they were known by the name of Chalky and that they and their friends dressed in men's clothes. On the following day, the informant identified pictures of Massey and Bostick and stated that there was little doubt that they were active in "bag-ups" or in mills.

On January 14, 1970, the informant told Strano that "something was happening," that "something was in the wind," and that "[t]he girls were getting ready." The following day the informant told Strano that "it wouldn't be a big one but it might be going down, and very possibly at 866 Elsmere." On January 16, the police officers waited at 866 Elsmere Place from early morning until about 6:00 p.m. Strano spoke to the informant by phone and was told, "'It is off. I don't know what happened but all the girls are out in the street.'"

On January 20, 1970 Strano spoke to the informant again.

The informant told him that "they were ready again," that "there was a lot of confusion," that "there would be a lot of girls involved" and that it would not be at the usual place. The informant said he would try to ascertain the location.

On January 21, 1970, Strano and another officer followed Massey from Elsmere Place to the corner of Loring Place and Burnside Avenue, where she entered a building. That evening, the informant told Strano that "'It is really hot. It is going. The girls are moving. They are all happy. They are going to make money.'" Strano asked the informant what he knew about "'Loring Place and Burnside.'" The informant hesitated and asked, "'Big corner building?'", to which Strano replied,"'Right'." The informant then said "'There is a girl that lives in there, they call Tess, but she has a lot of nicknames and she is involved in all kinds of games.'" He also stated that the apartment had been used before and that it was on the third floor.

On January 22, 1970, Strano spoke to the informant for the last time prior to the arrest. The informant told him, "'Everything is go. They are all ready. It is going to start early in the morning. It is going to be a big one. Be careful and good luck.'" The informant also confirmed the address and the apartment again. Officer Strano went to the District Attorney's office and obtained a "no knock" search warrant. Prior to the raid

on January 23, one of the officers learned from the name on the doorbell and through verification by the phone company that the occupant of apartment 3H was Tessie Truehart.

Early on January 23, 1970, police officers took up positions at 866 Elsmere Place and 1874 Loring Place. At about 7:45 a.m., a woman, later identified as Ann Brown, was observed entering 1874 Loring Place. At 8:00 a.m. a Buick with New Jersey registration came up Burnside Avenue and parked on the corner of Burnside and Loring, on the opposite side of the street from 1874 Loring Place. A man, later identified as the petitioner, got out of the driver's side of the car, walked to the rear of the vehicle, and stood there for three to five minutes looking up and down the street. At approximately 8:05 Massey emerged from 1874 Loring Place, approached petitioner and engaged him in conversation. After both petitioner and Massey looked around the street again, petitioner opened the trunk of the car and removed a cardboard box, a paper bag, and a valise. Petitioner and Massey then carried these items into 1874 Loring Place. Officer Strano testified that "as is usual in a mill case, when a man pulls up, he was met by one girl who usually runs the mill."

At approximately 8:30 a.m. officers stationed at 866 Elsmere Place observed Bostick leave that address in the company of another woman and get into a cab. These officers phoned the

officers at 1874 Loring Place to be on the lookout for Bostick and then proceeded to 1874 Loring Place themselves. While positioned at Loring Place, police officers observed numerous women enter 1874 Loring Place between 9:00 a.m. and 10:30 a.m., some of whom they recognized from previous surveillance and some of whom appeared to be dressed in men's clothing. Two women were directly observed entering apartment 3H. One of the officers who entered the building "heard a lot of female voices in apartment 3H." At about 10:30 a.m. Bostick appeared on West Burnside and Loring Place carrying two shopping bags of food. After being joined by another woman, Bostick entered 1874 Loring Place.

At about 12:30 p.m. the police officers entered 1874 Loring Place. One of them overheard someone in 3H say, "'Hey Chalky'" and a short time later heard a female voice say "'Hey Beverly, is the food ready?'."

At about 1:00 p.m., four officers proceeded down the fire escape to the bedroom window of apartment 3H, while three other officers waited in the hallway outside the apartment. Weapons drawn, the four officers climbed through the bedroom window and proceeded to the living room where they observed two men and some thirteen women around a table. On the table, in front of some of the women, were small piles of white powder, and at the end of the table near the two men were two plastic bags containing

white powder. Also on the table were boxes of glassine envelopes, scotch tape, and rubber bands. The officers observed the women placing white powder into the glassine envelopes, sealing them, and then placing the glassine envelopes into bundles with rubber bands. The men were at the same time mixing some white powder. Two of the officers testified at the suppression hearing that in their opinion the people in apartment 3H were engaged in operating a narcotics mill. The officers in the hall were let into the apartment; the people in apartment 3H were arrested; and the white powder and other items on the table were seized.

Effect of Petitioner's Guilty Plea

At the outset, we must determine whether the petitioner by entering a plea of guilty in the State court is now precluded from asserting by way of habeas corpus the unconstitutionality of the seizure of evidence. In recently addressing this issue, the Court of Appeals stated that "where state law permits a defendant to plead guilty without forfeiting his appeals on collateral constitutional claims, it would be a trap to the unwary if a defendant who waived his right to trial in reliance on state appeal procedures was thereafter precluded from pressing his federal constitutional claims in the district court." United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1170 (2d Cir. 1974). Relevant

here is N.Y. Criminal Procedure Law §710.70(2) (McKinney's 1971), which provides:

> "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

In the present case, petitioner's motion to suppress evidence was granted by the trial court. However, on appeal by the State, the Appellate Division reversed the trial court and was affirmed by the Court of Appeals. It was after the affirmance by the Court of Appeals, but before his petition for habeas corpus that petitioner pled guilty to the charge of criminal possession of a dangerous drug in the first degree. Petitioner alleges that at the time of sentencing he made clear his intention to pursue his constitutional claims in federal court, relying on N.Y. Criminal Procedure Law §710.70(2).

Although petitioner pled guilty after appeal on his constitutional claims was completed in the State courts, a procedural posture which differs from that in Newsome, supra, the rule of Newsome seems applicable. Here as in Newsome, it would be an unwarranted interference with New York State's administration of justice to dissuade defendants from pleading guilty and encourage them to proceed to trial simply to preserve their constitutional claims for purposes of habeas corpus relief, a

situation which the New York Legislature has sought to alleviate through N.Y. Criminal Procedure Law §710.70(2). Accordingly, petitioner's plea of guilty does not preclude him from seeking habeas corpus relief in this Court.

During the suppression proceedings before Justice Brust, the District Attorney conceded that the search warrant obtained on the day before the raid was void by reason of the insufficiency of the supporting affidavit. However, in the State appellate courts, the District Attorney was successful in sustaining the warrantless seizure of evidence on January 23, 1970 on the theory that the seizure was incident to a lawful arrest. The issues now confronting this Court, therefore, are whether petitioner's arrest was based on probable cause, see Mayer v. Moeykens, ____F.2d____, Docket No. 73-2473 (2d Cir. March 27, 1974), and whether the entry of the police officers into apartment 3H to effect that arrest otherwise violated petitioner's Fourth Amendment rights. For the reasons hereinafter discussed petitioner's application for a writ of habeas corpus is denied.

Probable Cause

In determining whether petitioner's arrest was based on probable cause, this Court must focus on "'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information'" when at approximately

1:00 p.m. on January 23, 1970 they raided apartment 3H at 1874 Loring Place and arrested the petitioner and others. Brinegar v. United States, 338 U.S. 160, 175 (1949). The combination of an informer's tip and corroborative evidence obtained by police investigation may be sufficient to establish probable cause, even though each alone would not. Whiteley v. Warden, 401 U.S. 560 (1971); Draper v. United States, 358 U.S. 307 (1959); United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972); United States v. Manning, 448 F.2d 992 (2d Cir. 1971)(en banc decision).

During the course of their three-month investigation, the Narcotics Bureau officers had been told by at least three different sources that Massey and Bostick were active in narcotics traffic. Both had arrest and conviction recordsffor narcotics violations. Indeed, as a result of the surveillance on 866 Elsmere Place, Bostick was arrested on October 29, 1970 emerging from an apartment in possession of heroin-filled glassine envelopes after apparently engaging in milling the heroin.

On January 5, 1970, Officer Strano requested one of his confidential informants to assist him in the investigation. That informant told Strano that Massey and Bostick both used the nickname Chalky, that they and their friends dressed in men's clothing, and that Massey and Bostick were active in "bag-ups" or in mills. The informant recognized the Loring Place building and also stated

that a girl lived there called Tess, that her apartment was on the third floor and that it had been used before. Finally, on January 22, the informant told Strano that a narcotics mill would start early in the morning on January 23, 1970 in apartment 3H at 1874 Loring Place. In corroboration of the informant, police investigation revealed that the occupant of apartment 3H was Tessie Truehart.

Further corroboration of the informant's tip was developed by police investigation on the morning of January 23 at the time and place stated by the informant. At 7:45 a.m. a woman was observed entering 1874 Loring Place. At 8:00 a.m. a car parked near the Loring Place building. The petitioner emerged, walked to the rear of the car, and stood there suspiciously looking up and down the street. Some five minutes later, Massey, who was known to the police, emerged from 1874 Loring Place, approached petitioner, and engaged him in conversation. After both petitioner and Massey looked around, petitioner opened the trunk of the car and took out a cardboard box, a paper bag, and a valise. He and Massey then carried these items into 1874 Loring Place. A meeting between the girl running the mill and the person bringing the drugs was a pattern which these experienced police officers recognized in mill cases. Then significantly, during the next couple of hours, numerous women, some of whom were known to the police as

associates of Massey and Bostick, and some of whom were wearing men's clothing entered 1874 Loring Place. Two were directly seen entering apartment 3H. Bostick herself left 866 Elsmere Place and arrived at Loring Place. Prior to the raid, the police overheard "a lot of female voices" in apartment 3H, overheard someone use the nickname Chalky, and overheard a female voice call out to "Beverly." All of these events corroborated the informant's tip and together with that tip were sufficient to establish probable cause for believing that a narcotics mill was operating in apartment 3H at 1874 Loring Place at 1:00 p.m. on January 23, 1970.

Entry

In spite of the existence of probable cause, this Court would still have to grant petitioner's application for a writ of habeas corpus if the manner by which the officers entered apartment 3H violated petitioner's rights under the Fourth Amendment. Since the District Attorney conceded that the "no knock" warrant obtained by the officers on January 22, 1970 was void, the entry here involved must be sustained, if at all, as a warrantless entry. Cf. Whiteley, supra; Coolidge v. New Hampshire, 403 U.S. 443, rehearing denied, 404 U.S. 874 (1971).

Warrantless, unannounced entry through a bedroom window was sustained in the State appellate courts on the basis of

"exigent circumstances." The presence of "exigent circumstances" has been recognized as an exception to any possible rule embodied in the Fourth Amendment that police entry into a dwelling must be announced. See Sabbath v. United States, 391 U.S. 585 (1968); Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); United States v. Artieri, 491 F.2d 440, (2d Cir. 1974); United States v. Manning, supra.

At the time of their entry into apartment 3H, the police officers were presented with a situation involving a large number of people, the possibility of destruction of evidence, cf. Ker, supra at 40, and considerable risk to their physical safety.* Cf. Sabbath, supra at 591; Artieri, supra at 444. In view of these exigent circumstances, the unannounced entry of the officers did not violate the petitioner's rights under the Fourth Amendment.

Petition for writ of habeas corpus is denied. However, in view of the important constitutional questions presented, leave to appeal in forma pauperis and for a certificate of probable cause is granted.

It is so ordered.

Dated: New York, N.Y.
June 6, 1974.

U. S. D. J.

* Officer Roche testified at the suppression hearing that "[t]he people who run mills usually pack guns to protect the mills so they don't get taken off by outsiders, not by police officers."

HOLDING OF THE STATE TRIAL COURT

THE COURT: Therefore the Court grants the motion made by all the defendants herein, except the defendant Ann Brown who did not join in this application, to suppress, rather to declare the warrant invalid, and it is further ordered that the evidence procured or seized by virtue of the search warrant is suppressed. Is there any exception to that? All right. Now the only issue now before us is whether or not-- wait a minute. Before I go ahead are you gentlemen putting in any evidence or resting?

(All counsel - "We rest".)

THE COURT: The only issue now before the Court, the only question now before the Court is whether or not the arrest of all the defendants made herein on January 23, 1970, was legal and sufficient in law and whether the contraband alleged to have been seized by the police officers as a result of the arrest and search, rather, and whether the contraband seized concededly without a warrant as incident to a lawful arrest, is admissible in evidence or should be suppressed. Is that the issue?

MR. BERNHEIM: Yes.

THE COURT: Do you agree to that Mr. O'Malley?

MR. O'MALLEY: Yes, that is correct.

THE COURT: Now what do you want to do?

MR. BERNHEIM: If it please the Court, the defense would like to argue orally on the issue before the Court.

THE COURT: I have no objection to that, have you Mr. O'Malley?

MR. O'MALLEY: No objection.

THE COURT: All right Mr. Bernheim. Are each of you going to argue?

MR. GELLER: No, we agreed that Mr. Bernheim will take the ball for all of us.

THE COURT: Mr. O'Malley, I am going to ask you to order the minutes of the argument.

MR. O'MALLEY: It is agreeable to me, but may I have it on the record for what purpose -- all right.

THE COURT: For the use of the Court only.

MR. BERNHEIM: If it please the Court, we contend that on the basis of the testimony that has been adduced at this hearing, that it follows as a matter of law that the arrest of the defendants in this case were unlawful on the grounds that the officers did not have probable cause to believe that a crime was being committed within the premises at the crucial point in time. Secondly, we submit, your Honor, that

the items that were seized were not seized as an incident to the arrest and thirdly, we contend your Honor, that the entry into the apartment was unlawful because forcible. The first proposition of law that we submit to the Court is that on the issue of whether the officers had probable cause to believe that the defendants were committing a crime, that the question of probable cause would have to be resolved on the basis of what the officers knew before they were on the fire escape. Because once the officers were on the fire escape they were on the curtilage of the premises and they were trespassers. I believe it is fundamental, your Honor, that probable cause must be determined before the officers committed a trespass; one of many cases in point on that issue is People against Laurio (phonetically) which is found in 10 NY 2nd.

THE COURT: Can I interrupt you to see if we can shorten it.

MR. SINGER: We agree with that.

THE COURT: Will the District Attorney concede that based on information which the police officers had up to the time the warrant was signed there was not sufficient cause for the officers to enter the

apartment without consent and make the arrests that were made without a warrant?

MR. SINGER: No, we will concede this much; that the officers had to have probable cause before they entered on that fire escape or not at all.

THE COURT; Now wait a minute. You are not answering my question. The warrant was issued one day before the so called raid was made here and the arrest and seizures were made. Do you concede that based on the information the officers had up to the moment the warrant was signed, there wasn't sufficient probable cause for them to enter the apartment in question without a warrant and arrest the occupants therein and seize whatever contraband was therein?

MR. SINGER: Well I have a little difficulty with that in this -- concededly all the information the officers had was not reflected in the affidavit in support of the search warrant, but I really at this stage --

THE COURT: Well the affidavit and the evidence that the Court heard from the police officers as to what they knew and observed and saw up to the granting of the search warrant.

MR. SINGER: Well I don't think we are willing to make that concession at this time. I have a little

difficulty in determining the exact relevance of that particular time because our contention is that the probable cause or the relevant probable cause is on the morning or afternoon of the 23rd.

THE COURT: Let me point out to you the decision in Spinelli which is cited. Spinelli versus United States, 393 US 410. In that case, the Court, the Supreme Court held that the Court invalidated the warrant because of the insufficiency of the affidavit. Now in the footnote in that case, this is stated by the Court, "It is of course no consequence that the agents might have had additional information which could have been given to the Commissioner". Off the record. "It is elementary that in passing on the validity of the warrant the reviewing Court may consider only information brought to the Magistrate's attention. Aguilar versus Texas, 378 US 108, 109, in one parenthesis emphasizes original parenthesis closed. Since the government, excuse me, let me go back. After the Magistrate's attention, that is "is closed", and then it states Aguilar et cetra, et cetra, this is not in quotes, this is part of the note. Since the government does not argue that whatever additional information the agents may have

possessed was sufficient to provide probable cause for the arrest, thereby justifying the result of search as well, we need not consider that question. So of course the Court inferred there that up to the time what the warrant was granted, was before the Commissioner there was not sufficient for the officers to go in and make a search and seizure without a warrant and therefore whatever justification the officers may have had in going into the apartment, must be based on whatever additional information these officers had prior to going into the apartment, which wasn't contained in the affidavit, and whatever information they obtained subsequent to the warrant between the date of the execution of the warrant, rather between the date of the signing of the warrant and the actual execution of the warrant.

MR. SINGER: Yes, I understand.

THE COURT: In spite of the fact that the District Attorney has conceded that the Court had no right to sign the warrant in this case, I want to make a finding, it might facilitate this phase of the hearing. In this particular case, in the Court's opinion there was nothing to indicate either the reliability of the informant or the credibility of

the informant's information. That is, all the informant said in this case was that the informant had obtained -- that Brverly Massey who he described in detail, I don't know if it was a he or a she, Beverly Massey has obtained apartment 3H in premises 1874 Loring Place from one, Tessie Truhart, for the specific purpose of processing and packaging a narcotic drug, to wit, heroin. Now there was no probable cause in this affidavit which supported this assertion. This is merely what I would call a tip to the police. There was nothing in the affidavit and in the course of testimony given here, and I am now referring to the actual testimony given by the police officers, there was nothing to indicate how the informant obtained this information or that the informant had observed any illegal activity in the apartment sought to be searched. As I recall, the only testimony with reference to that was that some months before one of these officers had arrested one of the defendants here in another premises, I think in Manhattan, and I think for either possessing or participating in packaging of narcotics and incidentally, according to the officer up to the present moment, there has been no conviction in that case. And with

reference to the officers, with reference to the affiant officer, and even the testimony given by the other officers who testified here, there was nothing to indicate that any of these officers had any independent knowledge or information based on their own observations other than mere suspicion that illegal activities were either going on or about to take place in the Loring Place apartment. All the affiant officer stated in his affidavit and testified to on the stand was that he had observed Beverly Massey who he said, who I think he said, was the defendant he had arrested, in conversationwith other known narcotic violators including one who had been previously arrested by him. So that even as far as the officers are concerned, up to the date, up to the moment the warrant was issued none of them had any actual knowledge or reason to believe other than mere suspicion, that illegal activities were going on in the Loring Place apartment. So there won't be any question, what the Court's view of the law is if there is any quarrel with it, I wish you would let me know now, whether an arrest and seizure is made with or without a warrant, what we are concerned with is probable cause and the quantum, and I am quoting from

People versus Marshall, 13 NY 2nd 28, the quantum of proof necessary for a showing of probable cause to justify the issue, expunge that -- start, probable cause existed, when there is reasonable grounds of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched. It is not a matter of technical rules or tight in exact definition. The question always is, what in the common judgment of reasonable men would be regarded as good, sound cause; remembering that we seek only probable, not absolute cause, and whether probable cause is present in a particular case must be determined from the facts of that case, and in support of that I cite also US against Ramariz 279F 2nd 712, 714, and I have already stated what I quoted came from People against Marshall 13 NY 2nd 28, page 34.

MR. SINGER: In order to facilitate matters in all candor, and this is without conceding anything with regard to the quality or quantity of the informant's information, as your Honor made some indication of, I don't think that we can take the position at this time that as of January 22, 1970,

that these officers had sufficient probable cause to arrest these defendants without a warrant.

THE COURT: Repeat that. You say what?

MR. SINGER: As of the time the warrant was issued, I have some reservations as to whether or not there was sufficient probable cause as th testimony developed.

THE COURT: In other words you agree with me there wasn't probable cause up to that moment so therefore we have to look at whatever happened between the time the warrant was signed and the time it was executed, whether or not there was probable cause for the police to break into the apartment and arrest the defendants and seize the contraband.

MR. SINGER: That in connection with what they knew up to January 22nd.

THE COURT: Now wait a minute. By stating that they had no probable cause, implicit in that is what they knew. I have already said that. In other words what I said before, I am basing that conclusion not only on what was contained in the affidavit which was totally insufficient, but on the evidence given in this Court as to what all these officers knew up to the moment the warrant was signed.

MR. SINGER: My point is that in determining probable cause we still have to go back to what they knew prior to the time the warrant was issued.

THE COURT: You are begging the question.

MR. SINGER: As long as we don't misunderstand each other then the concession is as you say.

THE COURT: I am prepared to rule now that there was no probable cause. Now wait a minute. So there won't be any misunderstanding between you and me; up to the time the warrant was signed, if the police didn't have sufficient information to indicate probable cause for getting the search warrant, or obtaining a search warrant, they certainly didn't have sufficient cause to make an arrest without the warrant.

MR. SINGER: Absolutely.

THE COURT: Unless a crime was committed in front of them and there is no doubt here that these officers did not witness any illegal activity at Loring Place. They didn't see any narcotics, they didn't see any transactions.

MR. SINGER: That is correct.

THE COURT: Prior to their breaking into the apartment.

MR. SINGER: That is correct. I think we understand each other.

THE COURT: I will quote from Malinsky, People against Malinsky, 15 NY 2nd, 86, page 91. The Court stated, I am quoting now from People against Baldwin, 25 NY 2nd 60, which was decided last July, the Court of Appeals there stated in part "In People against Malinsky, 15 NY 2nd 86, 91, we made it quite clear that for the People to prevail at a suppression hearing they must go forward in the first instance with evidence to show that probable cause existed in sustaining the legality of the search warrant without a warrant as incident to an arrest." Then of course they go on to say while the ultimate burden of proof is on the defendant, the People must in order to make out a prima facie case at the suppression hearing, come forward with some evidence to show probable cause. Now do you say there was probable cause up to the moment the warrant was signed to justify an arrest here without a warrant?

MR. SINGER: There was a probable cause but there were factors to be considered in determining the eventual probable cause.

THE COURT: I agree with you.

MR. SINGER: Fine.

THE COURT: But if there wasn't anything after that.

MR. SINGER: We wouldn't be here now.

THE COURT: The motion has to be granted without any further adieu, so all we are concerned with now is whatever transpired and I go back to between the time the warrant was signed, the moment the warrant was signed and the actual raid to determine whether there was probable cause for the officers to break into the apartment and make the arrest which they testified they did.

MR. SINGER: This may be a question of semantics. I wouldn't say that is all we are concerned with. I would say that is the major portion.

THE COURT: Continue your argument.

MR. BERNHEIM: Your Honor has stated most of what I was going to say. There are however one or two more points I would like to add if I may, and I would be very brief at this point.

THE COURT: I am not holding you to being brief. Don't misunderstand me. This is a very important motion and I am willing to accord both sides as much time as you need providing you get through by July 3rd.

MR. BERNHEIM: At this time it would be appropriate for me to focus on the testimony of the officers of what transpired on January 23rd before theygot on the fire escape, before a police officer

took a crowbar and pried open the window, thrust his hand under the window, moved aside the drapes. I take it we are all agreed that any observations made from the fire escape cannot be considered by your Honor in determining whether there was or was not probable cause.

THE COURT: For that matter, let me state that even if the observations are considered within the law, from the testimony of the officers they didn't observe anything illegal happening. As a matter of fact I questioned the officer myself and I recall one of the officers said, all he was able to see was girls sitting around a table. Neither he nor any of the other officers testified that they saw anything which could possibly be interpreted by this Court as illegal activity unless you consider sitting around a table an illegal activity. He didn't, none of the officers testified they saw any narcotics or any other equipment used in packaging.

MR. BERNHEIM: What we are concerned with is testimony by the officers that the defendant Powell was seen to drive up in an automobile, he got out of his automobile and he went to the trunk of his automobile. He opened the trunk of his automobile, he took out a suitcase, a paper bag, a package and then he

looked up and down the street. Later, your Honor, we are told that a female joined him and was there by looking up and down the street. That was supposed to lead your Honor to a belief that a crime was about to be committed. Does not the testimony of the officers that he was later joined by a female, rather suggest that the logical conclusion is that this man was waiting to meet somebody, was looking up and down the street to see if that person was coming and indeed the person did come. Finally we come to the packages themselves. The People have introduced into evidence the photographs of what they were able to see. You have a suitcase, you have a bag and so forth. Nothing distinctive about them. The officers themselves admitted there was nothing distinctive about them. This brings us to People against Malinsky, 15 NY 2nd, the case which I know your Honor is familiar with, because your Honor has already refered to it. In People against Malinsky, you had a very similar factual situation. A warrant had been issued but the warrant had been improperly executed so the warrant was out of the case. Again there was an informant but for reasons similar to the reasons in this case, the informant amounted to nothing

more than an unreliable, uncorroborated informant's tip. That was out of the case as in this case, the officers had been following people around. What the officers actually saw in Malinsky, were the defendants loading boxes to a truck. As it turned out the search revealed that the boxes contained stolen materials as the officers suspected and this is what the highest Court in this case had to say about that and I quote, and I am reading from 266 NY 2nd, page 73. "And their observations after receipt of the informant's communication not only did not indicate that the defendants were engaged in crime but fell far short of substantiating the informer's statement that there had been a theft or that the defendants were dealing with stolen goods. True, the officers did see Malinsky and Lustigman as well as the third defendant placing cartons on trucks at the building, but quite obviously these observations did not constitute independent evidence sufficient to corroborate the informant's story of a crime or in and of itself establish probable cause for arrest. Indeed the officers had no way of knowing except insofar as it was perhaps indicated by the informer's tip that the defendants were wrongfully on the premises or that the cartons were

stolen or contained stolen merchandise." Your Honor I submit that this passage by the highest Court in this state is directly in point on the issue of the significance to be attached by your Honor to the officers observations of the defendant Powell that the packages, that the suitcase and the boxes, the contents of which the officers themselves admitted they were entirely ignorant; that issue, your Honor, is no longer an open issue inthis state. I would further submit your Honor that in addition to the issue of probable cause, we have another issue which is an important issue although I would assume that your Honor would never reach it. I say that because it is our contention, I think the law is quite clear that the arrests in this case were unlawful because the officers did not have probable cause prior to their trespassory act, but in any event, your Honor, it is not anything that is seized at a time when an arrest is made which is justified as being seized incident to a lawful arrest. A search incident to a lawful arrest is a search which is made after people are placed lawfully under arrest. There is no testimony in this hearing that the seizures in this case were made before or after the arrests were made. As a matter of fact, testimony was, if I am not

mistaken, that Detective Strano made the seizures and there were a number of officers who were making arrests.

THE COURT: Let me interrupt you. Is there any question but that the contraband was openly exposed on a table? If we accept the testimony of the officers, the contraband was openly on the table. All the paraphernalia used in packaging was open on the table. They didn't have to go into another room or open up any drawers or look under any beds to find this contraband and this paraphernalia, and according to their testimony when they made the arrest all these defendants were grouped around a table. There is no evidence that they made the arrest in any other room of the apartment, or that any of the tenants or that any of the occupants had fled or were fleeing the apartment. Their testimony was, as I heard it, that all the arrests were made in the premises and I assume that because of the number of defendants here, each officer instead of one officer making all the arrests, each officer, each of four officers made their respective arrests for the sake of convenience.

MR. BERNHEIM: Correct. I am not raising the

Shimmel issue. All I am saying is the seizure might be before the arrest and they are not incidental to the arrest therefore. Another consideration is this. During the course of this hearing the People have cited two cases, People against Arter and People against Mack. People against Mack is a case in which there was an uncorroborated tip that led an officer to stop an individual, frisk him and the frisk revealed the revolver. At that time your Honor I submitted in answer to Mr. Singer's reliance on Mack, that I believe that his reliance on Mack was inappropriate in this case. I submitted that Mack was clearly a stop and frisk situation and that less was required to justify a temporary detention and frisk and search.

THE COURT: That doesn't require any further argument as far as I am concerned.

MR. BERNHEIM: I want to say I have obtained an unofficial report of that case.

THE COURT: I have read the case, and I agree with you.

MR. BERNHEIM: It is quite clear to me that frankly speaking, your Honor is probably far more abreast of the law in this area than I am and for me to continue at this point would only be redundant. I

submit there has been a flagrant violation of these defendants' rights, secured by the 4th and 14th Amendments. Invasion of their privacy. The search was utterly unlawful, the seizure unlawful and on behalf of every defendant I request that your Honor suppress all the items seized.

THE COURT: You concede for the purpose of this argument that the Court must accept not the opinion but whatever evidence the officers' testified they saw, heard or observed as true without conceding the truthfulness of the testimony. In other words there is --insofar as the officers' testimony there is no question of credibility involved.

MR. BERNHEIM: We have not offered any evidence.

THE COURT: I am not referring to their opinion.

MR. BERNHEIM: The fact, the testimony is not contradicted by any other testimony, your Honor.

THE COURT: You say assuming everything the officers says to be true there is no probable cause here.

MR. BERNHEIM: Yes. I am saying, however, that there is any rule of law that I know of that says you have to assume the truth of a police officer's testimony. I am only saying assuming for the purpose

of this argument, this is a motion.

MR. BERNHEIM: I would say, assuming your Honor were to elect in your discretion, choose to believe every word you heard from the stand, if you were to exercise that choice, the law would require your Honor to suppress every thing that was seized from the apartment.

THE COURT: That is what I wanted to hear from you.

MR. SINGER: Your Honor, in this case I think in order to establish probable cause you have to start off with the proposition that as of January 23, 1970, these six police officers, detectives, who made the raid in this case, knew in their own minds that Beverly Massey and Naomi Bostick were mill operators. They heard from the anonymous informant, they heard it from Naomi Bostick's own co-defendants, they heard it again from Detective Strano's informants.

THE COURT: What you are telling me is they had good reason to suspect.

MR. SINGER: Good reason to know I would say. Good reason.

THE COURT: No, we are holding as a matter of fact sustaining the warrant. I stated that -- in stating

that the warrant was based on insufficient affidavit, I stated that as far as whatever information the officers had up to the 23rd, up to the time that is they obtained the warrant, that is, was mere suspicion and nothing else; as far as the informant's information is concerned that was a mere tip. There is nothing substantial in that infomation. The informant didn't say how he or how she obtained the information, whether she was, he or she was -- ever present in the apartment or saw anything, and as far as the officers were concerned there was nothing that any of these officers said that buttressed the suspicion that illegal activities were going to take place there. As police officers, they had a right to suspect but that is not sufficient. That doesn't constitute probable cause.

MR.SINGER: As to the informant's tip, your Honor, we take the position that the tip of January 5th combined with the tip of January 21st to the effect that these two girls were going to use apartment 3H of a given premises, premises that the informant knew its location, knew where it was, knew that it was on the corner of Burnside and Loring Place, knew the apartment and knew the name of the person who rented

that apartment, whose name appeared, whether or not it was the true name of this person, the name appeared in the telephone company's records and on the doorbell; that this information was so detailed as to take it out of the category of rumor under Spinelli and People against Munger 24 N.Y. 2nd, page 455; that this information was more than just a tip.

THE COURT: Is it your contention that the People have proven that this was a reliable informant?

MR. SINGER: Not as to previous reliability but as to the reliability of this information, yes, because it was corroborated by independent observations

THE COURT: By whom?

MR. SINGER: By these police officers.

THE COURT: Wait a minute. They didn't corroborate the fact that this lad rented the apartment or obtained the apartment for any purpose. All they knew was that she said that. They didn't go to the landlord. They didn't go to anyone to find out if this lady had obtained the apartment. As far as they knew the only reason for believing that this lady occupied this apartment, for whatever reason, whether legal or otherwise or illegal, was because this informant said so.

MR. SINGER: They also checked out the name. The informant gave them the name as Tessie. They checked out that name. That name appeared on the doorbell and in the telephone company records of apartment 3H, of that address. That was the testimony of Detective McCrorie this morning.

THE COURT: What does that prove? There is nothing to stop an informant to go to a house, pick out a name in a doorbell and come up and say so and so is carrying on illegal activities in that apartment.

MR. SINGER: These officers arrested Naomi Bostick in October. They arrested her in a mill. They had information from three different sources that Naomi Bostick and Beverly Massey were mill operators.

THE COURT: Fine, but that doesn't mean that every house she went into was of necessity a mill.

MR. SINGER: If your Honor will allow me to finish I would like to tie this in and make my argument.

THE COURT: I will say this in passing. If I were sitting as a jury in this case and were able to disregard rules of evidence and the law, I would have no hesitancy in finding these defendants guilty beyond a reasonable doubt, but unfortunately for the law, that is for the People's case, I must follow the

rules of evidence and follow the law as laid down by the Court of Appeals and the Supreme Court of the United States.

MR. SINGER: I just say --

THE COURT: I would be the first one to say that in narcotic cases it is my own personal opinion that the law enforcement officers should be given much more leeway than they are given now because the only way you are going to apprehend people who violate the narcotic laws is by fighting with their own tools. In a crime of burglary or murder or some other such crime you have a victim, a citizen. In narcotic cases I realize, I have sat on hundreds of these during the last several years, and 99% of the cases we are dependent on the evidence of police officers in order to obtain evidence sufficient for a conviction. So very frankly I sympathize with your position. Now you may continue.

MR. SINGER: In passing I would like to say if your Honor feels that you can return a verdict of guilty beyond a reasonable doubt it is a lot more than you need to establish probable cause for an arrest.

THE COURT: No. I am only saying if I was sitting

as a trial juror -- I am not -- let me make it perfectly clear -- in meeting the burden of going forward, you are not required to meet that burden by proving anything beyond a reasonable doubt.

MR. SINGER: In any event again the police officers arrest Naomi Bostick in October. In January they received information again from an informant used in the past that Beverly Massey and Naomi Bostick were again operating mills. They instituted a surveillance on the premises occupied by these two women at 866 Elsmere Place. By the way the informant also stated the people who worked for Beverly Massey and Naomi Bostick were in the habit of wearing men's clothing. They go and make these observations. They make observations from January 5th, 1970, to --

THE COURT: What is the significance that they wear men's clothing?

MR. SINGER: Because Officer Strano, I believe it was Strano, when he was making his observation at Elsmere Place he noticed one or several of these other defendants dressed in male clothing in conversation with or in the company of Beverly Massey and Naomi Bostick.

THE COURT: What difference does it make what they were wearing?

MR. SINGER: As a matter of identifying those people.

THE COURT: This may affect their morals or something else.

MR.SINGER: No.

THE COURT: But certainly not the criminal activity connected with narcotics.

MR. SINGER: It is a question of being able to identify in the officer's own mind at this stage which people -- not everybody who was in conversation with Naomi and Beverly is a mill girl, and not everybody that wears men's clothes and has conversation with those two are mill girls.

THE COURT: Only two girls are identified as so called mill girls.

MR. SINGER: The point is these girls were seen, these girls were seen in the company of Beverly Massey and Naomi and again seen on the morning of January 23rd. The same girls, some of these same girls were again seen entering the apartment, the apartment which the officer had information and reason to believe was going to be used on that day. It was in the process of being

used on that day as a mill operation. These same girls, the same girls that they saw in the company of Beverly and Naomi before were again seen that day, and if your Honor would look at some of those pictures entering in, there are at least one or two in there, the first one in sequence in which the clothing worn by that particular girl was men's clothing or could appear to be men's clothing.

THE COURT: I don't understand what you emphasize -- what is the difference if they were wearing men's clothing? I believe the officers' testimony that they identified these people as being who they are, regardless of what they were wearing. I believe the officers' testimony as shown in the photographs as to what they observed on the morning of the raid, I accept all that as true.

MR. SINGER: The officers during the period of their surveillance and observation of the two subject persons in this investigation, namely Beverly and Naomi, trailed Beverly Hassey to the 1874 Loring Place residence. Then had a conversation with this informant. His informant said, "Is that the corner building? If that is the corner building, then I know the apartment number. They have used it in the past." Again, everything that has been done in this

investigation --

THE COURT: Wait a minute. Let me interject. You said some were wearing male clothing. Maybe they were going up there for immoral purposes as distinguished for activity involving narcotics.

MR. SINGER: Any number of inferences or reasons can be given to any number of acts. The question is whether when you put it all together is it reasonable to infer they were going up there for that purpose or the purpose of running a mill and we submit that when you put it all together, all the information the officers had from various sources, everything that they knew about these people, the information received from their informant and the fact which I will get to in a moment of Joseph Powell going up to that apartment with that suitcase and that shopping bag; there is only one inference those officers could reasonably draw from all those facts, and that was the mill operation was going on in apartment 3H of 1874 Loring Place on January 23, 1970. Again going back to the informant's information, the informant's information as it came back eventually was "that the mill was going early tomorrow morning", meaning the 23rd. The mill was going to be at a given apartment at a given address. This was the

given address that Beverly Massey was followed to the night before. Everything is dovetailing in this case. Everything in the officer's mind is coming together. Everything they ever knew about these people is coming to a head on the morning of January 23rd. Joseph Powell comes up in his car, he looks around the block and Beverly Massey, one of the mill girls, the subject of this intensive investigation, comes down to meet him and the officer testified that at that point when he looked around and opened that trunk and the two of them again looked around the street, that he formed an opinion that the stuff they were expecting at that mill was in the trunk of that car and that, I submit, is reasonable inference. A reasonable inference to be drawn from everything he knew about this case. He was the man bringing the stuff to the mill. The mill operator was coming down to meet him.

THE COURT: Wait a minute. There is no testimony that these officers knew, had any prior knowledge as I recall, of this man.

MR. SINGER: Not of this man, but of the fact that some man would be coming to that place, bringing the narcotics and this was the man who would come and -- but the officers concluded from that, in their

experience as police officers, and I submit that is a reasonable conclusion to be drawn, and finally Naomi Bostick entered these premises. She was followed from 866 Elsmere Place. She was seen leaving that place and she comes down bringing the food. That food that Detective McCrorie later heard one of the girls asking about --"when is it going to be ready?" These girls, at least two of them known to the officers, was seen going into apartment 3H on the morning of January 23rd. This is the same apartment that the informant said the mill was going to be operating in and these are the same girls that they previously had seen in the company of Beverly and Naomi, the two subjects of this investigation, and I submit when you put everything together that they saw and knew in this case, in the minds of reasonable experienced police officers, especially six experienced police officers, there was only one reasonable conclusion for those officers to come to on those facts, and that was that the mill was being operated at that time, and when they entered that apartment to make that arrest, that is what they knew in their own minds. As to the matter of entry, the question has been raised in this case as to whether the officers had a right to break into the door. Under Section 178 of the Code of

Criminal Procedure the general rule is that a warrantless arrest may be made in an apartment but that notice has to be given to those inside before he can break down the door. There are recognized exceptions in the case law. I would like to cite several cases in that respect. One is People against McIlwain, 28 Appellate Division 2nd, page 711; People versus Allen, 19 NY 2d, 638. And People versus Delago, 16 NY 2nd, 289. Also Ker versus California, United States Supreme Court case cited with the approval of Delago, they stand for the proposition that given exigent circumstances, an officer may enter forcibly and without warning in order to make an arrest with or without a warrant, and I submit that the exigent circumstances did exist in this case. The reasonable fear of the police officers of retaliation, of weapons as well as reasonable fear of disposable nature of the contraband which they believe the defendants in this case to be in possession of. The very same reason that a no knock warrant was issued in this case and on those grounds I respectfully submit that the defendants' motion to suppress the evidence be denied.

THE COURT: Do you want to answer any of those allegations?

MR. GELLER: Very briefly. I don't want to rehash the entire motion again. In Mr. Singer's closing argument he constantly makes reference to information given by an informant, but he doesn't tell the Court that number one, that this is not a reliable informant. This is an informant who gave information approximately one year prior to the arrest in this case that led to an arrest of three individuals where we have no convictions. As a matter of law we are not dealing with a reliable informant and the Court must consider that. Furthermore any information that must be given by an informant under Spinelli or Aguilar, under a host of cases, must describe how the informant came about this knowledge. All we have heard on this witness stand was general statements by an officer to the effect that the informant told me it is going down today, going down tomorrow. The thing is coming. Expressions like that. There is not one bit of testimony your Honor that the informant was ever in this apartment, that the informant ever spoke to any of the defendants, that the informant ever saw narcotics. We don't know what the informant saw. We don't know his name. We don't know the names of the people he allegedly led to arrest. We know nothing of this man. All we have are general statements. Furthermore, Spinelli makes it perfectly

clear that the information given by an informant must be detailed. That is lacking in this case. And all of the testimony on the 23rd day of January, prior to the arrest, your Honor, was absolutely innocent behavior. The mere fact that a man gets out of a car and carries a few cartons or cases into an apartment, that is totally innocent activity and Spinelli also says in Spinelli, F.B.I. agents followed a professional gambler around for a period of almost three weeks and saw him going in and out of houses. Telephones, they checked numbers. This is all innocent behavior. Legitimate people constantly take trips with cars and bring packages in. The officer never heard of Joe Powell before January 23rd. No narcotics were ever seen prior to the time they entered the apartment. No statement concerning narcotics were ever overheard here. Prior to the time they forcibly broke into this apartment all their information was from an unreliable informant. All their observations were of innocent activity. That is what this case comes down to and I respectfully ask your Honor to grant this motion.

THE COURT: I think I have already stated that in my opinion the informant was unreliable and I base

that on the information set forth in the affidavit. As counsel pointed out, although the police officer did know this informant for about two years, he only obtained information from him which resulted in three arrests, not convictions, but arrests. And as a matter of fact, the three arrests took place as a result of one event. It wasn't three separate events. And in People against Schnitzer (phonetically) 18 NY 2nd 457, the Court set down guide lines which influence/in me making the finding that the informant was not a reliable informer or that the People haven't proven that he was reliable and in People against Schnitzer the Court stated, "In Malinsky, 15 NY 2nd 86, we again stated as we previously stated in Covy (phonetically) that reasonable cause may be provided by communication from an informer so long as that information is substantiated either by the informer's character and reputation or by the separate objective checking of the informer's tale. Now here we find neither. Let me call your attention to, I think it is a comparatively recent decision, People against Anthony Fino, are you familiar with that -- in that case I will read pertinent parts from the opinion of Judge Scileppi -- defendants were

convicted of the crime of bookmaking onthe basis of evidence seized pursuant to a search warrant and in the affidavit, the reason I am reading the affidavit, because this affidavit in my opinion contains some of the elements that were provided by the police officers and which elements were not contained, which information was not contained in the affidavit of the affiant officer in the case before us. In that case the affidavit reads as follows; "That your deponent has been conducting an investigation relative to gambling being carried on at the above premises, 556 Lakeview Avenue, the Town of Orchard Park, Erie County, New York; that on April 25, 1962, your deponent observed one James Falerio (phonatically) a known gambler whose true name is Mariano Falerio, BPD #30, 771, entering the said premises;'that on April 26, 1962, your deponent and other investigators working with deponents observed said Faliero, again entering said premises and that the said James Faliero was arrested for failure to have a gamblers stamp"and they go on to state that the premises so described as 556 Lakeview Avenue, et cetera, is one and one half story split level, [illegible] dwelling listed to Aldo Delamonte (phonetically), that these observations were made during

the normal bookmaking hours, and in the affidavit it goes on to say that on June 11th the deponent observed Anthony DiNasco (phonetically) a known bookmaker, entering premises at 556 Lakeview Avenue in the company of Anthony Fino another known bookmaker, and both named defendants were dropped off by an unknown white male operating a 1956 Cadillac registered, registration listed to Anthony B. Masca; and the both individuals remained there. That on June 12, 1962, at approximately 11:55 a.m. your deponent observed again Masca and Fino dropped off by the same Cadillac above described entering said premises 556 Lakeview Avenue; that on June 13, 1962 at 12 noon your deponent together with another investigator observed the said Anthony Fino and Anthony Masca entering premises 556 Lakeview Avenue. And each of said occasions, June 11, 12 and 13th, each of the individuals were carrying large envelopes. That based upon the above observations there were reasonable grounds for believing the said premises of 556 Lakeview Avenue are being used for the purpose of violating Section 973, et cetera, of the penal law. There are two non listed telephones at the premises, 556 Lakeview Avenue, and in holding the warrant in

that case insufficient, the Court stated in the instant case assuming the facts as set forth in the affidavit to be true, as we must, we conclude that observations by police officers of several allegedly known bookmakers entering on various occasions, a private dwelling, wherein therewere located two unlisted telephones and nothing more, does not rise above a bare suspicion that the crime of bookmaking is being committed on the premises. Now in this particular case I fail to see where the People have met the burden of going forward and showing that there was sufficient probable cause for the officers to enter the apartment without a warrant, make the arrest which they stated they made and seized the contraband which was seized herein. I hold there was no underlying circumstances from which the officers could conclude that -- no, expunge that. Just as in the case of the warrant, of a warrant, it is also true in the case of an arrest without a warrant, probable cause must be determined by a neutral and detached Magistrate and not by the officer engaged in the often competitive enterprise of ferreting out crime, and this Court is not unmindful of the rule laid down by the Court of Appeals in People against Schnitzer that the resolution of doubtful and marginal

cases in this area should be largely determined by the preference to be accorded to the warrant. However, in this case, this Court must conclude, I am not quoting now, I am rendering my opinion, this Court must conclude for all the reasons I have stated throughout the argument that assuming everything the officer stated to be true, that is insofar as what they saw and observed, I am not talking about their opinion evidence, everything they testified to is not sufficient to provide a basis for a finding of probable cause, and accordingly, I grant the defendants' motion in all respects. Not only do I declare the warrant herein invalid, but I also declare that the arrest of all the defendants with the exception of Ann Brown, who didn't appear here, to be illegal arrests, and I also grant -- I further grant the motion, declare that all the evidence seized herein is inadmissible in evidence. Are there any further questions?

MR. GELLER: Yes, I do. Thank you for this motion. And your Honor yesterday you remanded Mr. Joseph Powell for the termination of this hearing. Your Honor has now granted the motion. I am confident that the District Attorney will take an appeal and it probably [illegible] more than a year or longer.

THE COURT: I am not dismissing the indictment.

MR. GELLER: I understand. All I am asking your Honor to do is reinstate Mr. Powell's bail. If he is to be arrested as a fugitive I will go with him and the officers to court and we will have him arraigned as is the normal course of events. But your Honor, I must point out, Mr. Powell appeared in court each and every day of this hearing even before he was remanded.

THE COURT: I didn't remand him because he failed to appear here. I remanded him for the reason set forth by Mr. O'Malley yesterday in open court. Have you anything to say about that?

MR. SCHWARTZ: May I be excused now. I have to be in the office. I have a closing.

THE COURT: You will be through in five or ten minutes. What is your pleasure?

MR. O'MALLEY: In the event bail is reinstated the detectives are here to take him down around the horn to have bail set by the Criminal Court on the extradition.

MR. GELLER: That is what we want.

THE COURT: The Court reinstates bail on the defendant.

MR. O'MALLEY: Rather than bail be reinstated --

THE COURT: All right, bail reinstated for Defendant Powell. Do you want one of the officers to go down? I understand he has to be returned to the Department of Correction. Do you want one of the officers --

MR. O'MALLEY: Can we approach the bench?

MR.GELLER: My understanding between your Honor and Mr. O'Malley regarding Joseph Powell is that he will be held in remand until tomorrow morning. The case will be on your Honor's calendar tomorrow morning. It will be called before your Honor and at that time Mr. O'Malley tells me he will consent to having Mr. Powell's bail reinstated. Your Honor will direct that the bail be reinstated and Mr. Powell will be turned over to one of these officers to be arrested on the fugitive complaint and treated as all of the fugitive complaints are.

MR.O'MALLEY. Yes, that is the understanding.

MR. GELLER: May I be excused? One other. I also represent the defendant Henry Lee.

MR. O'MALLEY: I will consent to five thousand on Henry Lee.

THE COURT: Very well. The Court reduces the bail on Lee to five thousand.

MR. BERNHEIM: I wonder whether at this time the People are prepared to make any motion with respect to the defendant Winnie Jones.

MR. O'MALLEY: With respect to all the defendants the People have full intention of appealing this. We ask for a 30 day adjournment so we can take such appeal.

THE COURT: Since this case will be appealed, is it agreed by all counsel including the District Attorney's office that it won't be necessary for the Court to render a decision or sign any order other than what is already contained in the minutes?

MR. O'MALLEY: Agreed by the District Attorney.

MR. BERNHEIM: May I approach the bench?

(Whereupon Mr. Bernheim approached the bench.)

THE COURT: The Court now stands adjourned. Bail continued for all defendants.

(Whereupon the Court adjourned at 3:30 p.m.)

* * *

Certified to be a true and accurate transcript of the minutes.

Florence Greenberger
Official Court Reporter

PEOPLE v. POWELL, 36 A.D.2d 177

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* JOSEPH POWELL, HENRY LEE, SANDRA LOVE, LISA ARNOLD, DEONILDA FRANK, MARCELLE THOMAS, MARY TOWNSEND, NAOMI BOSTICK, ROBBIE TAYLOR, BEVERLY MASSEY, WINNIE JONES, SANDRA NEWLAND, LINDA RANSON and ALBERTA STOKES, Respondents.

First Department, March 25, 1971.

Crimes — unlawful search and seizure — probable cause existed for invasion of apartment, arrest of defendants and seizure of narcotics.

In view of the prior police information combined with observations of the police made on the morning of the arrest, even without the search warrant which the prosecutor concedes was void, there was sufficient evidence to justify a holding of probable cause for the police to invade an apartment, arrest defendants and seize a quantity of narcotics. The entry was legal and the arrest proper.

APPEAL from an order of the Supreme Court at a Special and Trial Term (JOSEPH A. BRUST, J.), entered June 18, 1970 in Bronx County, granting defendants' motions to controvert a search warrant and suppressing evidence obtained as a result of an unlawful search and seizure.

Alan D. Singer of counsel (*Burton B. Roberts, District Attorney*), for appellant.

Arnold E. Wallach of counsel (*Rubin, Gold & Geller,* attorneys), for Joseph Powell and others, respondents.

Louis L. Schwartz for Sandra Love, respondent.

Arthur J. Perry of counsel (*Perry & O'Rourke,* attorneys), for Mary Townsend and another, respondents.

David Bernheim of counsel (*Henry B. Rothblatt,* attorney), for Winnie Jones, respondent.

Jack Minoff for Sandra Newland, respondent.

McGIVERN, J. The People appeal from an order of the Supreme Court, Bronx County (BRUST, J.), entered June 18, 1970, granting defendants' motions to suppress narcotics evidence as having been obtained as a result of illegal search and seizure. We disagree and would deny the motions.

Since the latter part of October, 1969, the police of the Narcotics Division had been conducting an investigation into the activities of one Beverly Massey, a known figure in the illegal narcotics trade. Surveillance began with the receipt of a phone call on October 24, 1969. That informant gave the names and addresses of four women, all involved in narcotics, two of whom were "mill operators". All four of them are now among the 15 defendants arrested in a police sortie of January 23, 1970.

On the day before the disputed arrests and seizures, the police obtained a search warrant. Originally, the District Attorney took the position that the warrant was valid, but during the hearing and before the court made a final disposition, he conceded it to be void. As such, and since the briefs treat the warrant as void, the validity of the warrant is not before us on this appeal and we are called upon to make no ruling in respect of it. As appellants, the People pray only that the order of suppression made by the court below be reversed and the motions to dismiss be denied.

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Before the arrests, which were made on January 23, 1970, the police had acquired much information concerning the premises and the suspects. As an illustration, and as stated by Detective Strano, Beverly Massey had previously been seen in conversation with known violators, one of whom had previously been arrested inside of premises used for processing heroin. And further, based on protected information, he had reason to believe that Beverly Massey was processing heroin in Apartment 3H, Loring Place, Bronx, occupied by one Tessie Trueheart, the lessee and tenant, whose identity had been checked out by the police, and to which apartment the police had previously trailed Beverly Massey and her cohort, Naomi Bostick, also a known mill operator.

In view of such prior police information and knowledge, combined with their observations on the morning of January 23, 1970, we find that even without the warrant, concededly void, there was sufficient evidence to sustain a holding of probable cause, and to justify the arrest of the defendants and the seizure. The observation of the officers, experienced in narcotics detection, after prolonged investigation, substantiated their prior information or reasoned beliefs that the defendants actually were engaged in criminal activities. (*People* v. *Richardson,* 36 A D 2d 603; *Smith* v. *United States,* 385 F. 2d 34, 37.) Under these "exigent circumstances", the entry was legal and the arrest was proper. (*People* v. *McIlwain,* 28 A D 2d 711; see, also, *Draper* v. *United States,* 358 U. S. 307; *People* v. *Richardson, supra.*) And upon entry, the officers found the defendants processing 10 pounds of heroin for street sale, in 15,000 glassine envelopes. No small operation. And the contraband and the paraphernalia of their nefarious trade were all openly exposed on the table, the defendants engaged in a combined operation. Although the articles seized are not to be regarded as an element of probable cause, we may note the nature of them.

In determining the issue of probable cause, consideration must be given to the facts existing on the morning of January 23, 1970: the prior confidential information and concerted study, the coming together in an early Friday morning of known purveyors, mill operators, numerous females converging for a rendezvous in an apartment, where occupancy had been verified, the apartment to be used that day as a narcotics mill, as it had been so used before. And some of "the girls" had been seen previously, some that morning, in the company of the known mill operators, some of them with short hair and

in the esoteric garb of men's clothing. It is 7:55 A.M. The sight of so many "girls" up betimes, in that neighborhood, and in one place, standing by itself alone, would come under the heading of "unusual activity". (*People* v. *Hendricks*, 25 N Y 2d 129.) Then, on the scene there appears a stranger, Joseph Powell, in a Buick, with an out-of-State license plate. Emerging, he stands at the trunk of the car, his arms folded, and gazes around "for approximately five minutes, looking both up and down the streets as if he were waiting to go in". He is joined by Beverly Massey. They converse. They both reconnoiter. Together, they remove from the car trunk a suitcase, a cardboard box and a brown paper bag, and carry them into the building. Courts should not be blind to the plain implication of such a street scene. At this point, any ordinarily alert detective could have had "reasonable ground or probable cause * * * that is, observations or information sufficient to move a reasonable man to conclude that a crime is being committed or attempted". (*People* v. *White*, 16 N Y 2d 270, 273.)

And, in judging the conduct of these six experienced officers that early January morning, we cannot dissever their activities from their prior information that Beverly Massey and Naomi Bostick were known mill operators and had used Apartment 3H before for their illegal operations. "They were sort of the bosses or the gatherers of the girls, to run these operations". So spoke veteran Detective McCrorie. Indeed, a detective testified that just before entry, he heard the name "Chalky", a sobriquet favored by both of them. And they were known to the narcotics detectives from "their police photographs of past arrests along with their yellow sheets". And it was also known by these knowledgeable officers that the women who worked for them often wore men's clothing. Thus, we must view the police sally as the result of an ensemble of facts, a composite of knowledge. Altogether, there certainly was that degree of "unusual activity" justifying a conclusion of probable cause. (*Spinelli* v. *United States*, 393 U. S. 410.)

The main error of the Trial Judge was that he made an excision of all knowledge prior to the concededly void warrant and refused to consider it. But, as stated by Chief Justice BURGER, then Circuit Judge of the District of Columbia Court of Appeals: "As we have often observed, probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the

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'laminated' total". (*Smith* v. *United States*, 358 F. 2d 833, 837, U.S.C.A., D.C., cert. den. 386 U. S. 1008.) And, as stated in *Brinegar* v. *United States* (338 U. S. 160, 175 [1949]): "In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Accordingly, based on a combination of all the known circumstances, a totality of the prior information and current observations, these street wise detectives, in the light of their expertise, knew or had probable cause to conclude that mischief was afoot in Apartment 3H, and it involved contraband narcotics.

Thus, we would reverse so much of the order as was appealed from, on the law and facts, and deny the motions to suppress.

McNALLY, J. (concurring in result). The order should be modified on the law and the facts to deny the defendants' motion to suppress the evidence obtained as a result of the arrest, and as so modified, affirmed. The affidavit in support of the search warrant failed to state the underlying circumstances, and hence there is no factual basis therefor. (*People* v. *Hendricks*, 25 N Y 2d 129.) The District Attorney commendably and properly consented to the vacatur of the warrant. Nevertheless, the record establishes probable cause for the arrest of the defendants and the search incident thereto which yielded the evidence sought to be suppressed.

The District Attorney was entitled to sustain the arrest and search on evidence of the investigation of the police and their observations made on and prior to the date of the arrest, January 23, 1970. (*People* v. *Malinsky*, 15 N Y 2d 86, 96.) The evidence establishes that defendants, Beverly Massey and Naomi Bostick, during October, 1969 became subjects of investigation of the Special Investigation Unit of the Police Department which has jurisdiction of crimes involving narcotics. Said defendants resided at Apartment 2E, 866 Elsmere Place, Bronx County. After surveillance, on October 29, 1969, at Apartment 3G, 1764 Walton Avenue, Bronx County, Naomi Bostick and others were arrested. Naomi was arrested by Detective Joseph Strano. She then had in her possession 75 glassine envelopes of narcotics and was engaged in an operation described as a "mill". This involved the dilution of about one pound of heroin and packaging in glassine envelopes. During the days preceding January 23, 1970, Detective Strano

was in receipt of confidential information that a packing mill was to be put in operation on January 23, 1970 at Apartment 3H, 1874 Loring Place, Bronx County, which would involve activity by defendants Naomi Bostick and Beverly Massey. On the basis of such information, Strano on January 21, 1970 followed Beverly Massey from Elsmere Place to 1874 Loring Place, Bronx County. On January 23, 1970, commencing at 6:00 A.M., a number of detectives and policemen were stationed at and near 1874 Loring Place and 866 Elsmere Place. It had been ascertained that Apartment 3H of 1874 Loring Place was leased to one Tessie Truehart.

On January 23, 1970, the police observed many females, later fixed at 13, and males, entering 1874 Loring Place. Among them were defendants Beverly Massey and Naomi Bostick, and several females who had been observed by the police at 866 Elsmere Place, including defendants Marcelle Thomas and Robbie Taylor. At about 8:00 A.M., a Buick automobile with a New Jersey registration arrived and parked opposite 1874 Loring Place. The operator, a male, walked to the rear of the car and waited a few moments. At about 8:05 A.M., defendant Beverly Massey emerged from 1874 Loring Place, approached the Buick and engaged the operator in conversation. The operator opened the trunk and removed a cardboard box, a paper shopping bag and a valise which they carried across the street into 1874 Loring Place. Police had passed by and stationed themselves outside Apartment 3H and heard the voices of numerous females and names which had become familiar to them in the course of their investigation. At about 10:30 A.M., Naomi Bostick appeared at the premises with two shopping bags, was met by another female, and they both entered the building and the apartment.

Detective Strano testified as an expert on the packaging of narcotics the procedure observed was usually followed in the operation of a "mill"; the practice being to gather girls involved in the process at the apartment selected for the operation "before the junk got there"; that it is customary for the girl who ran the mill to meet the messenger bearing the narcotics. In this case, the girl was Beverly Massey.

It was the expert opinion of the police that prior to 1:00 P.M. on January 23, 1970, the mill was in full operation in Apartment 3H at 1874 Loring Place. Thereupon, they effected simultaneous entry through a window off a fire escape and a hallway door of the apartment. The entry exposed the defendants engaged in packaging 10 pounds of heroin, with paraphernalia

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Probable cause for the arrest and search here involved is that which would satisfy a reasonable, cautious and prudent police officer, with the knowledge, experience and expertise of the arresting officers. (*People* v. *Valentine*, 17 N Y 2d 128, 132.) The evidence clearly demonstrates a pattern of behavior and procedure followed by those engaged in the packaging of narcotics for users, including the employment of females involved in the traffic of drugs, their attendance at a selected site in advance of the delivery of the drugs involved, the delivery of the narcotics to Beverly Massey, the person in charge of the girls, and its immediate packaging. The concurrence of these events, in the opinion of one well versed in drug traffic, is hardly consistent with innocent or lawful activity. Here involved is abnormal activity, highly suspicious involving persons known to be engaged in the traffic of drugs reinforced by prior information of a packing mill. (*People* v. *Munger*, 24 N Y 2d 445, 452.) The informer's communication, in my opinion, together with the observations of the officers, established probable cause. (*People* v. *Smith*, 21 N Y 2d 698, 700.)

NUNEZ, J. (dissenting). On January 23, 1970 several police officers, armed with a "no knock" search warrant, raided Apartment 3H at 1874 Loring Place, Bronx, arrested 15 persons and seized more than 10 pounds of heroin and various items used to package and process heroin. Entry was effected by using a crowbar to open a window leading to the fire escape. Prior to trial the defendants moved to suppress the physical evidence on the ground that it had been obtained as a result of an illegal search and seizure. At the conclusion of the hearing the District Attorney properly and commendably conceded that the affidavit on which the warrant had been issued was legally insufficient and the warrant void. However, he sought to sustain the seizure of the evidence on the theory that the sum total of the knowledge possessed by the police immediately prior to their entry into the apartment gave them probable cause to believe that a narcotic mill was in operation at the raided premises.

The majority and concurring opinions lay much stress and justify the warrantless entry into this dwelling on the basis of prior acquired information. The sum total of such "prior acquired" or "protected" information and the twice asserted statement in Justice MCGIVERN's opinion that Apartment 3H

had been "so used before" (for the processing of heroin) is Detective Strano's statement in his affidavit in support of the void warrant "I have received information from a reliable* informant * * * that Beverly Massi * * * has obtained apartment 3H in premises 1874 Loring Place * * * for the specific purpose of processing and packaging a narcotic drug, to wit: heroin, thereat."

There is not a single word in this entire record that this apartment had been "so used before" for the processing of heroin or indeed for any other purpose by any of those arrested. No illegal activity in or about the apartment was observed. The informant did not say that he had ever been in the apartment, he had not seen any defendant in possession of narcotics; he had made no observations, nor had he overheard any conversations that would make the apartment suspect. His information was nothing more than a tip.

The majority opinion is most entertaining but quite inaccurate. As an illustration, the statement: "Before the arrests * * * the police had acquired much information concerning the premises. * * * As an illustration * * * Beverly Massey had previously been seen in conversation with known violators, one of whom had previously been arrested inside of premises used for processing heroin" is unfair and misleading. That someone had been previously arrested inside of *other* premises used for processing heroin in no way illustrates "that the police had acquired much information concerning the [raided] premises".

All of the activity of the police prior to January 23, 1970, their investigations, their observations, concerned premises other than Apartment 3H. The only observations made of this apartment were those of the 23rd as testified to by the police: At approximately 7:45 A.M. the defendant Ann Brown was observed entering, not the raided apartment, but the Loring Place apartment house. Numerous other females were also seen entering the building, several of whom were recognized by the police as having been seen in the presence of Naomi Bostick and Beverly Massey on previous occasions. At 8:00 A.M. an automobile bearing New Jersey license plates parked near the raided premises. The defendant Powell emerged, walked to the rear of

* At the hearing it was established that the informant was *unreliable*. While three defendants had been arrested in one case on his information, no convictions had resulted. Furthermore, the evidence shows that just one week before Strano applied for the warrant, the same informant had given the police erroneous information and that he had confessed to Strano that he did not know "what had happened", i.e., why his information had been incorrect.

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the car and looked around. Beverly Massey was then seen emerging from 1874 Loring Place. She approached Powell and talked to him. They then looked up and down the street; Powell opened the trunk of his car and removed therefrom a shopping bag, a brown cardboard box and a suitcase. He and Beverly Massey carried these articles into the building. Three police officers testified at the hearing that they formed an opinion that Powell had narcotic drugs in the suitcase, namely heroin, along with paraphernalia for bagging. They admitted, however, that there was nothing about the suitcase, the box or the shopping bag to indicate that they contained narcotics. At 10:30 A.M. Naomi Bostick arrived carrying two shopping bags of food and entered the apartment building. It was approximately 1:00 P.M. when the police broke into the apartment. Concededly, no observations of the activities within the apartment were made until the police had forced their way inside and were well within the apartment. After an exhaustive hearing, the experienced Trial Justice concluded that on the totality of the evidence the police did not have probable cause to believe a crime was being committed and suppressed the seized evidence. We agree with that determination.

The unidentified informant had furnished erroneous and unproductive information only a few days prior to the arrest of these defendants. The informant made no reference to an automobile, did not assert that a man would bring the contraband and was apparently completely unaware of Powell's identity. The activities observed by the police on January 23 were unremarkable. They were consistent with thousands of similar innocent vignettes that take place on the streets of large cities every day. The observed acts were susceptible of many innocent interpretations, "even between persons with a narcotics background" (see *People* v. *Brown*, 24 N Y 2d 421, 423 [1969]). The behavior, at most "equivocal and suspicious" was not supplemented by any additional behavior raising "the level of inference from suspicion to probable cause" (see *People* v. *Corrado*, 22 N Y 2d 308, 311, 313 and *People* v. *Brown, supra*).

The majority's action in reversing the findings of the able Trial Justice is directly contrary to the very recent (1969) ruling in *People* v. *Brown* (*supra*) where the Court of Appeals (p. 424) said: "The logical and practical problem is that even accepting ungrudgingly, as one should, the police officer's expertness in detecting a pattern of conduct characteristic of a particular criminal activity, the detected pattern, being only

the superficial part of a sequence, does not provide probable cause for arrest if the same sketchy pattern occurs just as frequently or even more frequently in innocent transactions. The point is that the pattern is equivocal and is neither uniquely nor generally associated with criminal conduct, and unless it is there is no probable cause."

The argument of the District Attorney that the police had probable cause to enter the dwelling in question is clearly an afterthought. The police would not have congregated in the vicinity of this apartment armed with crowbars and shotguns if they had not also been armed with their authority to enter without knocking, i.e., the invalid search warrant. Detective Strano so testified: "he [referring to another detective] wanted to look at the door and see how many locks *to execute our warrant* and make the arrest." (Emphasis added.) The authority for the search being illegal, it necessarily follows that the search itself is illegal and the seized evidence must be suppressed (Code Crim. Pro., § 177; e.g., *People* v. *Loria*, 10 N Y 2d 368, 373; *People* v. *Brown*, *supra*).

The information received from the informant having been unreliable, the fact that activity consistent with a tip actually took place, does not establish probable cause unless there was something unusual about the activity (*Spinelli* v. *United States*, 393 U. S. 410). New York law is to the same effect. In *People* v. *Corrado* (22 N Y 2d 308, *supra*) the police received a tip from an undercover police officer that a pound of marijuana would be passed on the corner of Kings Highway and East 16th Street between 9:00 P.M. and midnight. At 9:30 P.M. the police observed the defendant alight from an automobile and walk over to another automobile. He re-entered the car in which he arrived and handed four opaque manila envelopes to the driver. The Court of Appeals (p. 311) held that the conduct of the defendant which the police asserted "would be characteristic of *modus operandi* used for a 'drop'", was at most equivocal and suspicious and ruled that the arrest and seizure were unlawful. Certainly the undercover police officer in *Corrado* was more reliable than the informant in the case at bar.

The facts in this record justify the conclusion that the defendants were engaged in loathsome, criminal activities. However, we cannot shirk our obligation to uphold the rule of law, distasteful as the result may be to us. It should be remembered that "the worst criminal, the most culpable individual, is as

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much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent". (*People* v. *Donovan* 13 N Y 2d 148, 154 [FULD, J.]; quoted with approval in *People* v. *Mirenda*, 23 N Y 2d 439, 447 [KEATING, J., 1969].)

Since the search warrant was concededly void, it was no warrant at all and the police entered the dwelling, made the arrests and seized the evidence without a warrant. This fact alone compels suppression and affirmance. The officers were not responding to an emergency. They had the premises under observation for a period of about seven hours. The last observation was made at 10:30 A.M. The apartment was raided at 1:00 P.M. Certainly two and one-half hours was more than sufficient time for the sophisticated New York City police to obtain a valid warrant if the facts would support it. The police suspected a large scale "milling" operation. The defendants were not fleeing or seeking to escape. Indeed they could not, for the police had surrounded the premises. In similar circumstances the Supreme Court of the United States has held an arrest without a warrant illegal. See *McDonald* v. *United States* (335 U. S. 451, 454-455 [1948]) where the court stated: "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances. * * * We will not assume that where a defendant has been under surveillance for months, no search warrant could have been obtained. * * * We cannot allow the constitutional barrier that protects the privacy of the individual to be hurtled so easily. Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers heard the adding machine and, at the latest, when they saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant.

"Here * * * the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor as likely to be destroyed. * * * Petitioners were busily engaged in their lottery venture. No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek

a search warrant. But those reasons are no justification for by-passing the constitutional requirement".

Justice BRUST's order of suppression should be affirmed.

MARKEWICH, J., concurs with McGIVERN, J.; McNALLY, J., concurs in result in an opinion, in which MARKEWICH, J., concurs; NUNEZ, J., dissents in an opinion, in which CAPOZZOLI, J. P., concurs.

Order, Supreme Court, Bronx County, entered on June 18, 1970, reversed, on the law and facts, and the motions to suppress denied.

Search Warrant

SEARCH WARRANT NO. 020-70
DISTRICT ATTORNEY
BRONX COUNTY

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
TO ANY PEACE OFFICER IN THE CITY OF NEW YORK

Proof by affidavit having been made this day before me by Joseph Strano that there is probable cause to believe that there is in apartment 3H in premises 1874 Loring Place, Bronx County, occupied by Beverly Massi, narcotics, to wit: heroin, the means of committing a crime or offense, and the means of preventing a crime or offense from being discovered.

YOU ARE THEREFORE COMMANDED, during the day time, between the hours of 6 AM and 9 PM, to make an immediate search of apartment 3H in premises 1874 Loring Place, Bronx County, occupied by Beverly Massi, and the person of Beverly Massi, and of any other person who may be found therein to have such property in his possession or under his control or to whom such property may have been delivered, for narcotics, to wit: heroin, the means of committing a crime or offense, and the means of preventing a crime or offense from being discovered, that you may open any outer or inner door or window of the aforementioned premises without giving notice of your purpose and authority to execute said warrant, and if you find any such property or evidence or any part thereof to bring it before me at the Bronx County Courthouse, 851 Grand Concourse, Bronx County.

This warrant must be executed within ten days of the date of issuance.

Dated: Bronx, New York,
22nd day of January 1970.

Sidney A. Fine
Justice of the Supreme Court.

Affidavit of Joseph Strano in Support of Search Warrant

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

In the Matter

Of

the application of Joseph Strano of the Police Department of the City of New York for a warrant authorizing the search of apartment 3H in premises 1874 Loring Place, Bronx County, occupied by Beverly Massi, and of the person of Beverly Massi, for narcotics, to wit: heroin, the means of committing a crime or offense and the means of preventing a crime or offense from being discovered.

State of New York)
County of Bronx) ss.:

Joseph Strano, being duly sworn, deposes and says:

I am a Detective in the Police Department of the City of New York, assigned to the Narcotics Division.

I have received information from a reliable informant known and identified to me, who has given me information in the past leading to three (3) arrests in narcotic cases; one of which was a narcotic processing and packaging "mill"; that Beverly Massi, described as female, Negro, 5'6", 130 lbs, dark skinned, broken nose, known to the Police Department under B# 466 866, has obtained apartment 3H

in premises 1874 Loring Place, Bronx County, from one Tessie Trueheart, lessee and tenant of said apartment, for the specific purpose of processing and packaging a narcotic drug, to wit: heroin, thereat.

That your deponent has been conducting an investigation since the latter part of December, 1969, into the activities of subject person regarding illicit narcotic traffic, and as a result of surveillance of subject person and others, your deponent has observed said Beverly Massi in conversation with other known narcotics violators, one being Naomi Bostic, known to your deponent under B# 340 118, having been arrested by your deponent on a prior occasion inside a premises used for processing and packaging a narcotic drug, to wit; heroin.

That based on the foregoing reliable information and upon my own observations, there is probable cause to believe that said Beverly Massi, occupying apartment 3H in premises 1874 Loring Place, Bronx County, is in possession of and trafficking in illicit narcotics, to wit: heroin, thereat.

That because of the easily disposable nature of the contraband involved herein, it would be very easy to dispose of same while your deponent was in the process of knocking on the door and stating the purpose of his desired entry.

WHEREFORE, I respectfully request that the Court issue a warrant and order of seizure in the form annexed authorizing the search of apartment 3H in premises 1874 Loring Place, Bronx County, occupied by Beverly Massi, and of the person of Beverly Massi, and of any other person who may be found therein to have such property in his possession or under his control, or to whom such property may have been delivered, for narcotics, to wit: and that I be allowed to make entry to said premises without giving prior notice or stating my purpose and authority between the hours of 6:00 A.M. and 9:00 P.M., and directing that if

such property or evidence or any part thereof be found that it be seized and brought before the Court, together with such other and further relief that the Court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge or justice.

Joseph Strano

Sworn to before me this
22nd day of January, 1970.

SIDNEY A. FINE
Justice of the Supreme Court.

Certificate of Service

Oct. 1, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.